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U.S. Department of Justice

Office of Legislative Affairs

OCA 1758-88

Office of the Assistant Attorney General

Washington, D.C. 20530

OCA FILE Budget/Sec Misc

24 May 1988

Honorable Louis B. Stokes
Chairman
Permanent Select Committee on Intelligence
U.S. House of Representatives
Room H-409 Capitol
Washington, D.C. 20515

Dear Mr. Chairman:

The Intelligence Authorization Act for fiscal year 1986, Public Law No. 99-169, requires the Department of Justice to provide this Committee with a report on a provision of that law which permits certain federal agencies to enter into indemnification agreements with States and localities which make available to those agencies criminal history information on individuals being considered for federal security clearances.

Title VIII of this statute added a new section 9101 to Title 5 of the United States Code, which requires States and localities to make criminal history information available to CIA, DOD, OPM or the FBI (the FBI was added by section 402(a)(2) of Public Law No. 99-569) when requested in connection with an individual's security clearance. Section 9101 also permits the federal agencies to enter into indemnification agreements when requested to do so by States and localities in order to protect those entities where local law otherwise prohibits the release of such information. 5 U.S.C §9101(b)(3). Whenever such an agreement is entered into and a relevant claim arises, the State or locality is immediately required to notify the Attorney General and the local United States Attorney. Id.

Section 803(a) of Pub.L. No. 99-169 requires the Department of Justice to consult with DOD, CIA, OPM and FBI, and report to the appropriate committees of Congress on the effect of 5 U.S.C. Section 9101(b)(3) and, in particular, the effect of the absence of indemnification agreements upon States and localities not eligible for such agreements.

In general, the involved agencies find that the indemnification program has not greatly facilitated the provision of criminal history information but, rather, has caused a significant amount of disruption and time-consuming negotiations in a few cases, for the following reasons. Some State and local entities read the statute to require an indemnification agreement

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as a condition precedent to providing criminal history information to the federal government. Moreover, some entities believe the statute may prompt damage suits because the statute compels the disclosure of inaccurate or incomplete information. Further, a consortium of State and local criminal justice agencies has expressed dissatisfaction with the indemnification agreement, concluding that, while the statute renders State and local entities absolutely liable for the disclosure of information to the federal government, the indemnification agreement only protects the local entities from negligent disclosure.

On the other hand, no claims have arisen to date under any of the signed agreements, and there are no reports that ineligibility to enter into an agreement has prevented any State and local entity from providing requested information. Because the statute has not affected the flow of information from most local entities, and has created significant problems with others, OPM, CIA and DOD recommend that the indemnification program be allowed to expire. FBI declines comment based on its limited experience. A summary of each concerned agency's experience with this provision follows.

Department of Defense

Since this provision was enacted, DOD has received 14 requests to enter into agreements: 8 agreements have been signed; 2 are pending; 2 entities have been asked to provide additional information, and; 2 entities, located in South Carolina and Massachusetts, respectively, have declined to enter into agreements. No claims have been filed under any agreement.

The Defense Department strongly supports discontinuation of this program for the reasons discussed above. They find that, in most cases, the statute either does not facilitate or has no effect on the receipt of information from State and local entities, and, in a small number of cases, has created new barriers to the provision of information.

Office of Personnel Management

Since the statute was enacted, OPM has received 15 requests to enter into indemnification agreements: 3 have been signed; 5 were not eligible for an agreement; 3 provided no documentation to support their requests (i.e., a copy of pertinent State or local law prohibiting disclosure); 3 declined to enter into the agreement, and; 1 approved agency has not signed the agreement to date. No claims have arisen to date.

OPM also supports the expiration of this program for the reasons discussed above. It, too, has found that most entities have not expressed interest in an agreement, those ineligible to

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enter into agreements have not denied access to information and, in a few cases, differing interpretations of the program have caused extended problems.

Central Intelligence Agency

The CIA has received 11 requests for indemnification agreements: 4 have been signed; 2 are pending; and in 5 cases the CIA has requested additional information. No claims have arisen to date under the agreements. The CIA believes these statistics show a decided lack on interest in the indemnification program, and favor letting this provision lapse.

Federal Bureau of Investigation

The FBI has received only one request to enter into an indemnification agreement, from the Commonwealth of Massachusetts. The FBI intends to respond to this request once its implementing regulations and agreement form have been approved.

Please contact me if you have further questions.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General

cc. Honorable David L. Boren
Chairman
Select Committee on Intelligence
United States Senate

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